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In the Supreme Court of the United States

OCTOBER TERM, 1967

NOS. ——

UNITED STATES OF AMERICA, PETITIONER

v.

RICHARD G. AUGENBLICK

UNITED STATES OF AMERICA, PETITIONER

v.

KENNETH N. JUHL

PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

The Solicitor General, on behalf of the United States, petitions for writs of certiorari to review the judgments of the United States Court of Claims entered in these cases on May 12, 1967, and October 13, 1967.

OPINIONS BELOW

The opinion of the Court of Claims in *Augenblick* v. *United States* (App. A. 1–37) [1] is reported at 377 F. 2d

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[1] Pursuant to Rule 23(1)(i) of the Rules of this Court, the various opinions below are presented in a separate printed Appendix filed herewith.

586. The opinion of the Court of Claims in *Juhl* v. *United States* (App. C. 87–134), is reported at 383 F.2d 1009. The opinions of the Department of the Navy Board of Review in the *Augenblick* case (App. B. 38–86) are unreported.

JURISDICTION

The judgment of the Court of Claims in *Augenblick* was entered on May 12, 1967. A timely motion for reconsideration was denied on November 9, 1967. By order of February 1, 1968, the Chief Justice extended the time for filing a petition for writ of certiorari to March 7, 1968.

The judgment of the Court of Claims in *Juhl* v. *United States* was entered on October 13, 1967. A timely motion for reconsideration was denied on January 19, 1968.

In both cases the jurisdiction of this Court is invoked under 28 U.S.C. 1255(1).

QUESTION PRESENTED

Whether the Court of Claims, in actions for back pay, is empowered to review the validity of court-martial convictions; and, if so, what is the proper extent of such review?

STATUTES AND MANUAL INVOLVED

Article 76 of the Uniform Code of Military Justice, 10 U.S.C. 976, provides as follows:

> *Finality of proceedings, findings, and sentences.*
>
> The appellate review of records of trial provided by this chapter, the proceedings, findings,

and sentences of court-martial as approved, reviewed, or affirmed as required by this chapter, and all dismissals and discharges carried into execution under sentences by courts-martial following approval, review, or affirmation as required by this chapter, are final and conclusive. Orders publishing the proceedings of courts-martial and all action taken pursuant to those proceedings are binding upon all departments, courts, agencies, and officers of the United States, subject only to action upon a petition for a new trial as provided in article 73, and to action by the Secretary concerned as provided in * * * article 74, and the authority of the President.

The Jencks Act, 18 U.S.C. 3500, provides in relevant part as follows:

(a) In any criminal prosecution brought by the United States, no statement or report in the possession of the United States which was made by a Government witness or prospective Government witness (other than the defendant) to an agent of the Government shall be the subject of subpena, discovery, or inspection until said witness has testified on direct examination in the trial of the case.

(b) After a witness called by the United States has testified on direct examination, the court shall, on motion of the defendant, order the United States to produce any statement (as hereinafter defined) of the witness in the possession of the United States which relates to the subject matter as to which the witness has testified. * * *

* * * * * * *

(d) If the United States elects not to comply with an order of the court under paragraph (b) or (c) hereof to deliver to the defendant any such statement, or such portion thereof as the court may direct, the court shall strike from the record the testimony of the witness, and the trial shall proceed unless the court in its discretion shall determine that the interests of justice require that a mistrial be declared.

(e) The term "statement", as used in subsection (b), (c), and (d) of this section in relation to any witness called by the United States, means—

(1) a written statement made by said witness and signed or otherwise adopted or approved by him; or

(2) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement made by said witness to an agent of the Government and recorded contemporaneously with the making of such oral statement.

Paragraph 153a, U.S. Dept. of Defense, *Manual for Courts-Martial, United States, 1951,* promulgated by Exec. Ord. No. 10214, February 8, 1951, provides in relevant part as follows:

153. CREDIBILITY OF WITNESSES; IMPEACHMENT OF WITNESSES.—*a. Credibility of witnesses.*—

* * * * *

Also a conviction cannot be based upon the uncorroborated testimony of an alleged victim

in a trial for a sexual offense, or upon the uncorroborated testimony of a purported accomplice in any case, if such testimony is self-contradictory, uncertain, or improbable. The uncorroborated testimony of an accomplice, even though apparently credible, is of doubtful integrity and is to be considered with great caution.

* * * * *

STATEMENT

Several years after Commander Richard G. Augenblick and Master Sergeant Kenneth N. Juhl were convicted by separate courts-martial of unrelated offenses, they brought these actions in the Court of Claims to recover back pay lost as a result of forfeitures ordered by the respective courts-martial. In each case, the court accepted their contentions that certain alleged trial errors vitiated the convictions, and awarded them back pay and allowances. In *Augenblick* the Court of Claims concluded that there had been a failure of adequate compliance with the Jencks Act, and that the errors amounted to a fundamental deprivation of constitutional rights. In *Juhl* the court-martial conviction was treated as a nullity because the Court of Claims' appraisal of the evidence led it to conclude that there had been a violation of the paragraph of the Department of Defense *Manual For Courts-Martial* stating that a conviction cannot be based upon uncorroborated accomplice testimony which is "self-contradictory, uncertain, or improbable." We set forth the facts of each case separately, and in more detail.

1. *UNITED STATES V. AUGENBLICK*[1]

Augenblick, a full Commander in the United States Navy, was arrested by two District of Columbia police officers when he was observed in a compromising position in the company of an enlisted member of the Air Force, Airman Hodges. The two encountered one another late at night, in a "White Tower" restaurant in Washington, and then proceeded, in the Commander's car, to the West Potomac Basin, where they were parked when the police appeared. Augenblick was tried before a general court-martial on a charge of sodomy, in violation of Article 125, Uniform Code of Military Justice, 10 U.S.C. 925, but was found guilty under Article 134, 10 U.S.C. 934, of a lesser included offense, *i.e.*, committing an indecent, lewd, and lascivious act. The only testimony that an act of sodomy actually took place was the testimony of Airman Hodges. However, the two arresting police officers gave testimony fully supporting the finding of the lesser offense for which Augenblick was convicted.

The Jencks Act question in the case arises from the interrogation of Airman Hodges shortly after he and Augenblick were arrested.[2] There was some evi-

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[1] For the following statement of facts, we have relied primarily, as did the Court of Claims, on the opinion of the Board of Review (Apps. A. 1, B. 38–86).

[2] The Court of Military Appeals has applied this Court's decision in *Jencks v. United States*, 353 U.S. 657, to courts-martial, in an opinion which also cites the Jencks Act, 18 U.S.C. 3500. See *United States v. Heinel*, 9 U.S.C.M.A. 259 (1958). It is not clear whether the court viewed the Act as applying by its terms, or whether it was merely exercising supervisory powers over court-martial procedure.

dence that there existed a tape recording of Hodges' initial interrogation. The law officer at the court-martial (the equivalent of the trial judge) demanded that the government produce the tape. When it could not be located, he granted recesses to allow further searches and to give an opportunity for the calling of witnesses. Eight government employees who had handled interrogation tapes in the course of the investigation testified before the law officer during the hearings. One of these witnesses, Agent James, testified that he had made a recording of the Hodges interrogation, but none of the witnesses, including James, had heard a replay of the recording, and none except James recalled seeing the recording.[4] The testimony of the eight witnesses established that whatever recordings were made in the case passed through the hands of a ninth government employee—Agent Mendelson. At the pre-trial investigation,[5] Agent Mendelson had testified under oath, upon cross-examination, that he did not know whether a tape of the Hodges interrogation existed. When the defense requested that he be recalled from another city to testify at the court-martial, the law officer denied this request, concluding that Mendelson would add nothing to his previous, sworn testimony.

There was also evidence that Mendelson made written notes during the Hodges interrogation. The law officer decided, also on the basis of Mendelson's testimony at the pre-trial investigation, that he would not

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[4] It is conceded that a recording of the interrogation of Augenblick was made.

[5] See Article 32, 10 U.S.C. 832.

have to examine these notes himself to determine whether they were a "substantially verbatim recital" required to be produced under the Jencks Act, 18 U.S.C. 3500(e). Mendelson had testified that "I did jot down a couple of rough notes" at Hodges' interrogation (App. B. 65).

The court-martial conviction was affirmed by the Board of Review with one member dissenting on this point. With respect to the contention that the law officer should have called Agent Mendelson, instead of relying on the transcript of his testimony at the pretrial investigation, the Board stated (App. B. 61):

> Agent Mendelson appeared as a witness, several times during the various phases of the proceedings, having been recalled from Norfolk on one occasion. He was subjected to vigorous cross-examination by the defense. We therefore cannot agree that Agent Fason's testimony to the effect that he remembered giving certain tape recordings, received from Agent James, to Agent Mendelson, warranted the ordering of Agent Mendelson to again appear as a witness for this purpose.

The Board further found that the government had not resisted the demand for production of any tape that might have been made of Hodges' interrogation and that, indeed, the "law officer went to great lengths to assist the defense and government in their quest to locate the missing tape recording or determine what disposition had been made of it" (App. B. 60). Moreover, the Board pointed out, Hodges had testified under oath in four distinct proceedings, and despite

"vigorous cross examination by the defense", his testimony "did not waver" (App. B. 61).

The Board of Review also agreed that the law officer did not err in refusing to order the production of Mendelson's notes for examination. Quoting the Agent's testimony at the pre-trial hearing, the Board concluded that the notes had been offered to the defense at that time but the defense exhibited no interest in having them produced (App. B. 63, 68–69). Furthermore, since Hodges' "credibility was so exhaustively explored" on several occasions, the Board concluded, "the failure to produce the notes was not prejudicial to the accused" (App. B. 69).*

The Court of Claims held that there had been violations of the Jencks Act. With respect to the alleged tape recording of the Hodges interrogation, the court below construed the Board's opinion as holding that the defense had the burden of showing that the tape was no longer in existence and had not been destroyed for a valid reason; it termed this error "as a matter of law" (App. A. 22). The court then proceeded to hold that this approach infected the Board's affirmance of the law officer's decision to rely on Mendelson's pretrial testimony without calling him to testify again. In addition, the Court of Claims ruled that the law officer erred in not making an *in camera* examination of Mendelson's handwritten notes, since it decided that there was doubt as to whether his handwritten notes

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* Shortly after the interrogation at which Mendelson was present, Hodges was moved to a nearby Air Force installation where he made a written statement that was produced.

were a "substantially verbatim recital" producible under the Act. 18 U.S.C. 3500(e)(2).[1]

Finally, the Court of Claims concluded that what it found to be Jencks Act violations amounted to a denial of due process. The court suggested that Hodges "must have been a very dubious witness", reasoning that the members of the court-martial must have questioned his veracity since they acquitted Augenblick of the charge of oral sodomy—which only Hodges' testimony supported (App. A. 34). The court decided, nevertheless, that Hodges' testimony must have been of "critical importance" (App. A. 36) in the outcome, since the testimony of the civilian police officers—which supported the lesser included offense of which Augenblick was found guilty—was "not necessarily inconsistent" (App. A. 34) with the defense that Augenblick was asleep and, thus, not responsible for what he was doing. In view of the court's assessment of the importance of Hodges' testimony and the possibility that the missing tape and the written notes would have increased the ability of the defense to undermine his credibility, the Court of Claims concluded that "the Jencks Act violations were so weighty that they cumulated to the denial of a minimally fair trial" (App. A. 33).

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[1] The court stated that the law officer and the Board of Review did not find that there was no doubt that the notes were not producible (App. A. 30). In this respect the court must have overlooked the Board's explicit statement that: "When it is *doubtful* whether production of a particular statement is compelled by statute, such statement must be submitted to the judge for an in camera determination" (App. B. 60.) (Emphasis in original.)

2. *UNITED STATES* v. *JUHL*[1]

Juhl, an Air Force Master Sergeant stationed in England, was tried by a court-martial for violation of military regulations forbidding possession of Air Force Exchange merchandise in excess of reasonable quantities and selling such merchandise to persons not having exchange privileges.[2] The principal witness for the prosecution was Airman Hughes, who testified that he and Juhl, on several occasions, sold exchange merchandise to unauthorized persons and participated in irregular purchases at the base exchange (purchases made without punching the purchaser's ration card).

Juhl was convicted of three separate incidents of black market activity. With respect to two of these incidents, the testimony of Hughes was the only testimony supporting the conviction. As to one incident, Hughes' wife also gave testimony to support the conviction.

Paragraph 153a of the *Manual for Courts-Martial, United States, 1951,* in its chapter dealing with the rules of evidence, contains a discussion entitled "Credibility of Witnesses." After observing that questions of credibility are normally for the fact-finders, the paragraph states:

> a conviction cannot be based upon the uncorroborated testimony of * * * a purported ac-

[1] For the following statement of facts, we have relied on the opinion of the Court of Claims and the findings of the Commissioner (App. C. 87–134).

[2] These regulations were necessary because exchange merchandise was sold at prices lower than those generally prevailing in the British economy.

> complice in any case, if such testimony is self-contradictory, uncertain, or improbable. The uncorroborated testimony of an accomplice, even though apparently credible, is of doubtful integrity and is to be considered with great caution.

The Court of Claims held that Juhl's convictions were obtained in violation of this caveat. Following an extended discussion of the testimony, the court declared that Hughes' testimony was self-contradictory because he had concededly lied at his own earlier court-martial, denying participation in black market activities. In addition, there were inconsistencies, deemed by the court to be important, between Hughes' testimony at the pre-trial investigation and his testimony at Juhl's court-martial. There was contradiction as to whether Hughes had obtained the telephone number of a customer through Juhl or through a third party; whether transistor radios as well as cigars had been carried in the car in which Hughes and Juhl travelled during one delivery of black market goods; and whether Juhl was sitting in the car or standing outside while he served as a lookout during the unloading of the contraband."

When it came to the incident for which Mrs. Hughes gave corroborating testimony, the Court of Claims dismissed her testimony as "utterly devoid of probative value." In support of this evaluation, the court noted that Mrs. Hughes was German and had

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[20] The court noted that Hughes was not clear about whether on one trip he and his wife had been accompanied by their daughters or their dogs (App. C. 92).

only an imperfect mastery of English, and that her husband had been overheard coaching her as to how she should testify, contrary to the instructions of the law officer (App. C. 94–95).

During the court-martial, defense counsel and the law officer conferred on appropriate instructions on the law; the following colloquy occurred (App. C. 98–99):

> LAW OFFICER. It's my understanding, now, that the accused does not want instruction on accomplice testimony.
>
> DEFENSE COUNSEL. That is correct, sir. This was not the theory of the defense.

The Court of Claims noted that "defense counsel knew his way around court martials and his resourcefulness and zeal in behalf of his client were worthy of praise" (App. C. 99), and expressly recognized that "the record reflects a conscientious effort by the Law Officer to protect the rights of the accused and doubtless he would have delivered, if requested, an instruction built around Section 153a * * *." (*Ibid.*) After Juhl's conviction, the Staff Judge Advocate, in reviewing the case, noted that no instruction on accomplice testimony had been given and concluded that the instruction was unnecessary in view of the other instructions which had been given with respect to the defense's extensive efforts to impeach Hughes' testimony. In addition, he noted that the defense had specifically declined the accomplice-testimony instruction.

Nevertheless, in this back pay suit, the Court of Claims held that there was a violation of the accomplice-testimony rule and that this violation deprived

the court-martial of "jurisdiction". The court conceded that the *Manual For Courts-Martial* "is a lengthy and formidable document and it would boggle the imagination to suppose that a court martial should be totally invalid for failure to comply with any part of any provision" (App. C. 103). The court nevertheless concluded that, since the *Manual* used the language that "a conviction cannot be based" on self-contradictory, uncertain or improbable accomplice testimony, there must have been an intent to withdraw jurisdiction in the event of non-compliance. Accordingly, the court concluded that collateral attack for violation of the accomplice-testimony rule is permissible, that the evidence in Juhl's court-martial was unreliable, that the conviction was void, and that Juhl was entitled to back pay and allowances.

REASONS FOR GRANTING THE WRIT

In these cases the Court of Claims, although purporting to confine itself to a review of court-martial convictions for "jurisdictional" defects, has in substance assumed the power to act as a court of error sitting in review of military tribunals. Review on this scale is contrary to the congressional directive of finality in Article 76 of the Uniform Code of Military Justice, 10 U.S.C. 876. The lower court's approach is especially inappropriate in light of the establishment of a civilian Court of Military Appeals which exercises criminal jurisdiction and has shown itself to be highly sensitive to the rights of accused persons and the requirements of fairness in court-martial pro-

ceedings. The Court of Claims—which exercises a civil jurisdiction, has a six-year statute of limitations, and generally hears these cases at a time when retrial is not possible—is plainly ill-suited to exercise the powers of an appellate tribunal in court-martial cases. The instant decisions break sharply with an established tradition of restraint by the civil courts in review of court-martial proceedings, and conflict with the decisions of other federal courts which, following this Court's decision in *Burns* v. *Wilson*, 346 U.S. 137, assert a much more limited review of court-martial proceedings even on habeas corpus.

1. Article 76 of the Uniform Code of Military Justice provides that, once the prescribed channels of review have been traversed, court-martial sentences are "final and conclusive" and "all action taken pursuant to those proceedings are binding upon all * * * courts * * *." 10 U.S.C. 876. In its *Augenblick* decision, the Court of Claims noted the legislative history of Article 76—showing that Congress did not intend to abolish review by habeas corpus—and concluded that Congress could not have intended to create a distinction between habeas corpus and other forms of collateral attack (App. A. 4–6). However, this very legislative history reflects a clear purpose to confine collateral review to habeas corpus.[11] Moreover in Article 76, Congress was simply codifying prior law

[11] See S. Rep. No. 486, 81st Cong., 1st Sess., p. 32: "Subject only to a petition for a writ of habeas corpus in Federal Court, [Article 76] provides for the finality of court-martial proceedings and judgments." See also H. Rep. No. 491, 81st Cong., 1st Sess., p. 35.

that civil courts may review courts-martial only by habeas corpus. *In re Yamashita*, 327 U.S. 1, 8; *Wales v. Whitney*, 114 U.S. 564, 570. In *Wales*, this Court had explicitly noted that: "If there is no restraint there is no right in the civil court to interfere. Its power *then* extends no further than to release the prisoner. It cannot remit a fine, or restore to an office, or reverse the judgment of the military court." 114 U.S. at 570. And since the enactment of Article 76, this Court has reaffirmed this rule that habeas corpus is the only form of collateral attack. *Gusik v. Schilder*, 340 U.S. 128, 132.

Nor did the Court of Claims have any basis for suggesting that such a conclusion would create an unjustifiable anomaly. The power of Congress to suspend the writ of habeas corpus is severely limited by the Constitution (Article 1, Section 8), but there is no corresponding restriction on the authority of Congress to withhold other forms of collateral review. We find no basis in constitutional history, in the acts of Congress, or in the decisions of this Court for holding that a suit for back pay is a necessary corollary of the constitutionally guaranteed availability of review on habeas corpus.[12]

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[12] Two recent decisions in courts of appeals have allowed collateral review of court-martial proceedings by other forms of action where habeas corpus was unavailable. In *Ashe v. McNamara*, 355 F. 2d 277 (C.A. 1), the plaintiff had been dishonorably discharged pursuant to a court-martial conviction obtained in a proceeding in which he had concededly been denied the right to effective assistance of counsel. In a mandamus action, the court of appeals reversed the refusal of the Board for Correction of Naval Records to change the character of the

2. If the Court of Claims has any authority to review the validity and effectiveness of court-martial convictions, its scope of review should surely be no broader than that exercised on habeas corpus. There have been two approaches to the question of how extensively a court may review court-martial proceedings on habeas corpus. Under the more liberal view, the court on habeas corpus may follow the same test that a federal court applies to State criminal proceedings: any significant violation of constitutional rights is a basis for granting the writ.[12] Under the more restric-

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discharge. The court's rationale was that the statute creating the Correction Board (10 U.S.C. 1552) created a judicially enforceable exception to the finality provisions of Article 76. We note that this reasoning is contrary to the view of the Court of Claims in *Juhl* that "we do not think the finality, whatever it is, is either enhanced or diminished by the [Correction] Board proceedings" (App. C. 101).

In *Gallagher* v. *Quinn*, 363 F. 2d 301 (C.A.D.C.), certiorari denied, 385 U.S. 881, the court ruled that it had jurisdiction to consider, in a declaratory judgment action, the constitutionality of the statute defining the jurisdiction of the Court of Military Appeals. The court, however, denied the constitutional challenge on the merits.

Prior to 1948, the Articles of War contained no finality provision. In 1948, the Elston Act added Article 50h to the Articles of War, containing a finality provision from which Article 76 of the U.C.M.J., adopted in 1950, 62 Stat. 627, 637, was derived. S. Rep. No. 486, 81st Cong., 1st Sess. at 32.

Other cases in which, prior to the instant cases, court-martial convictions have been successfully subjected to collateral attack, all arose from courts-martial conducted before the finality provision in the Elston Act became effective. *Shaw* v. *United States*, 357 F. 2d 949 (Ct. Cl.); *Runkle* v. *United States*, 122 U.S. 543; *Fletcher* v. *United States*, 26 Ct. Cl. 541, reversed on the merits, 148 U.S. 84. See *Gusik* v. *Schilder*, 340 U.S. 128, 133 n. 3.

[12] See *Burns* v. *Wilson*, 346 U.S. 137, 148 (opinion of Frankfurter, J.).

tive, traditional view, affirmed in *Burns* v. *Wilson*, 346 U.S. 137, 142, the court may, on habeas corpus, review constitutional claims only to the extent that the military system itself has not given adequate consideration to them—at least where, as here, reconsideration of the constitutional claims would involve the re-evaluation of evidence already considered by the military tribunals. See, generally, *Kasey* v. *Goodwyn*, 291 F. 2d 174, 178 (C.A. 4); *Rushing* v. *Wilkinson*, 272 F. 2d 633, 641–642 (C.A. 5).[14] Even assuming, *arguendo*, that the Court of Claims has authority comparable to that of a district court on habeas corpus—a premise which we question—its treatment of these cases went well beyond what would have been permissible for a court on habeas corpus under either of the approaches noted above.

a. In *Augenblick*, the Court of Claims reviewed the court-martial record at least as extensively and independently as a court of appeals would review a criminal conviction in a district court. On this basis, it decided that the Jencks Act had been violated in two respects. We submit that if there was any departure

[14] *Burns* v. *Wilson* has been followed in *Swisher* v. *United States*, 354 F. 2d 472, 476 (C.A. 8); *Mitchell* v. *Swope*, 224 F. 2d 365 (C.A. 9); *Chandler* v. *Markley*, 291 F. 2d 157 (C.A. 7); *Palomera* v. *Taylor*, 344 F. 2d 937 (C.A. 10); and *Bennett* v. *Davis*, 267 F. 2d 15 (C.A. 10).

Under both views of habeas corpus review, the federal courts may review for court-martial "jurisdiction" in the traditional sense: jurisdiction over the person and offense, proper convening of the court-martial, and authority to impose the sentence. *Ex parte Reed*, 100 U.S. 13, 23; *Jackson* v. *Taylor*, 353 U.S. 569; *Reid* v. *Covert*, 354 U.S. 1; *Toth* v. *Quarles*, 350 U.S. 11.

whatever from the Jencks Act, it was at most marginal. All nine government agents connected with the alleged pre-trial recording testified and denied knowledge of its whereabouts. We agree that the government, rather than the defense, has the burden of producing whatever government witnesses might be helpful with respect to the circumstances surrounding a pre-trial statement. *Campbell* v. *United States*, 365 U.S. 85. But where all the government witnesses who might have knowledge of the matter have given testimony, and denied knowledge of the whereabouts of any tape, as happened here, it was hardly unconstitutional—or, indeed, a violation of the Jencks Act—for the Board of Review to entertain some doubt that the tape was ever made and thus refuse to conclude that there had been culpable destruction (App. B. 58, 62).[15]

Nor was there anything approaching serious error in the law officer's refusal to call Agent Mendelson

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[15] We also point out that the Court of Claims' stress on the question of where the Board of Review placed the burden of proof seems misdirected: surely the relevant question is where the law officer placed the burden of proof. The law officer's ruling is not clear in this regard, and seems to indicate that, in line with this Court's admonition in *Campbell* v. *United States*, 365 U.S. 85, 95, he was not viewing the matter as governed by rules regarding the allocation of burdens of proof among the parties. The law officer's ruling was (Court-Martial Record, vol. 6, pp. 146–7):

> Well, I might say gentlemen, that I don't feel the government can produce something that is not available. Of course, the issue is does it have it or does it not. I do not find from the evidence which has been considered in this out-of-court hearing any indication of any attempt to suppress this particular evidence. The government has satisfied me, at least, that reasonable effort has been made to locate this tape; the results have been negative.

for further testimony. Mendelson's sworn testimony at the pre-trial hearing (Apps. A. 25, B. 65–67), where he was subjected to cross-examination, was plainly inconsistent with the suggestion that he had destroyed the tape; certainly it was within the discretion of the law officer to conclude that Mendelson would add nothing further if he were to be summoned from another city. And whatever may be said about the existence *vel non* of Jencks Act violations here, certainly the facts in *Augenblick* fall far short of those cases in which State convictions have been held violative of due process for the prosecution's failure to produce out-of-court statements of prosecution witnesses. *Miller* v. *Pate*, 386 U.S. 1; *Napue* v. *Illinois*, 360 U.S. 264; *Alcorta* v. *Texas*, 355 U.S. 28; *Brady* v. *Maryland*, 373 U.S. 83, 86–88; cf. *Giles* v. *Maryland*, 386 U.S. 66.[16]

Furthermore, the Jencks claims related solely to the testimony of Airman Hodges, who alone testified to the completed act of oral sodomy. Yet the court-martial acquitted Augenblick of that charge, finding him guilty only of the lesser included offense of committing an indecent, lewd, and lascivious act—a finding fully supported by the testimony of two police officers. In the circumstances, it seems doubtful that there

[16] The *Augenblick* decision is squarely in conflict with the decision of the Tenth Circuit in *Dickenson* v. *Davis*, 245 F. 2d 317, certiorari denied, 355 U.S. 918. There a prosecution witness at a court-martial admitted that his testimony was inconsistent with a statement he had previously given the Army. Defense counsel's request to see the statement was denied. Nevertheless, the court of appeals refused habeas corpus, on the ground that the military courts had fully and fairly considered the contention that the pre-trial statement should have been produced.

would have been enough to warrant intervention on direct appellate review. Cf. *Rosenberg v. United States*, 360 U.S. 367, 370–71. If this case is held to justify collateral attack, it seems fair to predict that review of military proceedings by the boards of review and the Court of Military Appeals will prove in numerous cases a mere prelude to a second, belated review in the Court of Claims.

In *Juhl*, the Court of Claims conceded that what it determined to be non-compliance with the *Manual For Courts-Martial* was not a constitutional violation (App. C. 105–109). It then asserted that it may review for "statutory" as well as constitutional violations, at least where the statute is phrased in terms sufficiently emphatic to warrant the label "jurisdictional". However, even assuming that the *Manual For Courts-Martial* is equivalent to a statutory procedure,[17] we know of no case holding that a statutory rule of evidence—however emphatically expressed—is a basis for collateral attack on a court-martial. Indeed, in *Humphrey* v. *Smith*, 336 U.S. 695, this Court held that the requirement in the Articles of War for a pre-trial investigation—expressed in language at least as

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[17] The Court of Claims recognized that the *Manual* was promulgated by Executive Order, but concluded that it is equivalent to a statute because it was adopted pursuant to statute and had to be reported to Congress. (App. C. 102–103). The *Manual* was drafted by military officers as a guidebook summarizing the rules of evidence applied by court-martial review boards. See U.S. Dept. of Defense, *Legal and Legislative Basis: Manual for Courts-Martial, United States*, 1951, p. 241, explaining the paragraph involved in *Juhl*.

emphatic as the accomplice-testimony rule here involved—was not "jurisdictional" and would not warrant collateral relief on habeas corpus.[18] The fact that considerations of fairness and reliability may have motivated adoption of the accomplice-testimony rule does not imply that a civil court may collaterally determine when it has been followed and treat departure from it as vitiating the proceedings. Most rules of evidence are prompted by the same considerations. Yet surely the finality provision of Article 76 of the Uniform Code, if it means anything, leaves the military courts free to interpret and apply the procedures and rules of evidence in the Uniform Code and *Manual for Courts-Martial*.

Moreover, the accomplice-testimony rule in the *Manual for Courts-Martial* is phrased as a cautionary rule for the guidance of the trier of fact, since it turns on whether the accomplice testimony is "self-contradictory, uncertain, or improbable"—matters ordinarily left to the trier of fact. What the Court of Claims has done—as reflected in its extensive analysis of the evidence (App. C. 89–98)—is simply to weigh for itself whether testimony given years earlier was uncertain or unworthy of belief.[19]

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[18] *Humphrey* involved Article 70 of the Articles of War, which provided in relevant part: "No charge will be referred to a general court-martial for trial until after a thorough and impartial investigation thereof shall have been made." 336 U.S. at 697.

[19] We consider it significant that the Court of Military Appeals treats questions of compliance with paragraph 153a of the *Manual* as conventional questions of sufficiency of evidence, not as "jurisdictional" prerequisites. See *United States* v. *Polak*,

b. In both *Augenblick* and *Juhl,* the questions considered by the Court of Claims were fully and fairly considered by the military tribunals, thus squarely meeting the test of *Burns* v. *Wilson,* 346 U.S. 137, 142. In *Augenblick,* the Board of Review wrote a lengthy opinion (App. B. 38–86) which fully canvasses the Jencks Act questions. Commander Augenblick was represented before the Board by distinguished civilian counsel (App. B. 38), and the Jencks Act issue was also illuminated in a dissenting opinion of a Board member (App. B. 74–86).

In *Juhl,* the question of accomplice testimony was not considered by the court-martial because defense counsel—who concededly "knew his way around court martials" (App. C. 99)—expressly rejected the law officer's offer of an instruction on this question (App. C. 98–99).[20] Indeed, the Court of Claims con-

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10 U.S.C.M.A. 13; *United States* v. *Armstrong,* 4 U.S.C.M.A. 248. That court also disclaims a role in second-guessing determinations of credibility. See, *e.g., United States* v. *Taylor,* 5 U.S.C.M.A. 775; *United States* v. *Stewart,* 1 U.S.C.M.A. 648.

In the federal courts generally, the only responsibility of the appellate court is to insure that the jury is instructed—if the defense so requests—that accomplice testimony should be considered with great caution. If that instruction is given, a conviction may be based solely on accomplice testimony. *United States* v. *Karavias,* 170 F. 2d 968, 971 (C.A. 7); *Toles* v. *United States,* 308 F. 2d 590, 592 (C.A. 9); *United States* v. *Masino,* 275 F. 2d 129 (C.A. 2); *Dunn* v. *United States,* 318 F. 2d 89 (C.A. 5); *Joseph* v. *United States,* 286 F. 2d 468, 469 (C.A. 5). Since the instruction on accomplice testimony here was not requested (indeed, it was specifically waived), Juhl's conviction—had it been in a district court—could not have been upset on direct appeal.

[20] Compare Rule 30, F.R. Crim. P.

ceded that the law officer "doubtless * * * would have delivered, if requested, [the accomplice testimony] instruction." In the circumstances Juhl is hardly in a position to charge a lack of full and fair consideration of the accomplice-testimony point. Moreover, at the court-martial, counsel concentrated on the accomplice testimony, and extended instructions on impeachment were given. Thus the basic question of the credibility of the accomplice's testimony was squarely placed before the court-martial."[21]

3. Congress has established an elaborate code of criminal law for the military services and given careful attention to the correlative requirements for fair and orderly procedure. As part of the plan of the Uniform Code of Military Justice, Congress has specified review procedures which are in some ways even more liberal in protecting an accused's rights than the appellate process of the civil courts. Under the U.C.M.J., general courts-martial are subject to varying degrees of review by the convening authority, a Board of Review, the Judge Advocate General, the Court of Military Appeals, and the service Secretary involved. See Articles 64–69, 10 U.S.C. 864–869. At certain levels the Code authorizes ameliorative action even in the absence of any legal error. It is only after these processes have been completed that Article 76,

[21] The Court of Claims took the position in *Augenblick* that the full and fair consideration test of *Burns* v. *Wilson*, 346 U.S. 137, was not met because the law officer and the Board of Review "committed serious legal errors" (App. A. 31). But a legal error in a tribunal's decision does not mean that the tribunal did not give full and fair consideration to the matter before it.

10 U.S.C. 876, decrees that the proceedings are to be final and conclusive on all courts, agencies, and officers of the United States—except, however, for the continuing authority of the President and the service Secretary under Articles 74 and 75, 10 U.S.C. 874, 875, to grant further relief."

In developing this structure, Congress deliberately determined the extent to which—apart from constitutionally guaranteed habeas corpus—civilian agencies have a role to play in military justice. Providing that civilians may serve on Boards of Review and that there shall be control by a civilian Secretary, the Code goes on to create a civilian Court of Military Appeals entrusted with the final judicial responsibility for the supervision of military justice. That court has shown itself to be fully cognizant of the rights of accused persons in court-martial proceedings, and has enforced stringent standards of procedural fairness.[22]

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[22] Compare *United States* v. *Frischholz*, 16 U.S.C.M.A. 150.

[23] The legislative history stresses the authority and independence which Congress intended to confer on the Court of Military Appeals: "The Court of Military Appeals provided for in this article [Art. 67] is established in the National Military Establishment for the purpose of administration only, and will not be subject to the authority, direction, or control of the Secretary of Defense. The terms of the judges are fixed at 8 years. The judges are to be highly qualified civilians and for this reason the compensation has been made the same as that of a judge of the United States Court of Appeals." S. Rep. No. 486, 81st Cong., 1st Sess., at 28.

Ever since its decision in *United States* v. *Clay*, 1 U.S.C.M.A. 74 (1951), the Court of Military Appeals has made it clear that it will require courts-martial to grant accused persons the full measure of procedural protections granted by the Uniform Code, the *Manual for Courts-Martial*, and the applicable pro-

The Court of Claims, on the other hand, relying on its general jurisdiction over government pay claims, has assumed a role in the court-martial process which Congress has never undertaken to confer upon it. Moreover, as observed above, it is ill-suited to the role. It operates under a six-year statute of limitations (28 U.S.C. 2501), and generally hears these cases on a stale record and at a time when retrial is either impractical or impossible.[24] In light of the established tradition that the military constitutes a separate system of discipline, governed by a separate Code and different procedures, it is hardly surprising that Congress decided to place civilian judicial control of the military system of justice in a specialized court.

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visions of the Constitution as interpreted by this Court. See *e.g.*, *United States* v. *Jacoby*, 11 U.S.C.M.A. 428 (1960) (depositions on written interrogatories inadmissible at court martial, on ground that they deny right to cross-examination); *United States* v. *Herberg*, 15 U.S.C.M.A. 247 (1965) (search and seizure held illegal under authority of *Preston* v. *United States*, 376 U.S. 364); *United States* v. *Tempia*, 16 U.S.C.M.A. 629 (1967) (holding that *Miranda* v. *Arizona*, 384 U.S. 436, applies to military interrogations); *United States* v. *Lincoln*, 17 U.S.C.M.A. 330 (1967) (further application of *Miranda*); *United States* v. *DuBay*, 17 U.S.C.M.A. 147 (hearing ordered on allegations of command influence); *United States* v. *Prendergrass*, No. 20,514 (February 16, 1968) (reversal for improper instructions and remarks in prosecution's argument not based on evidence; prosecution has burden of proving that soldier who refused to go on combat mission on ground that induction was illegal was not under honestly mistaken belief that he did not have to comply with superior's orders).

[24] At the time these actions were filed, Angenblick was no longer in the Navy. Juhl was still in the Air Force, but the events underlying the court-martial took place in 1961.

4. The questions raised by the instant cases have a long reach. We are advised that during the period from July 1, 1962 to July 1, 1967, over 16,000 persons were convicted by general court-martial, with approximately 80,000 convictions by all types of court-martial during this period. The six-year statute of limitations in the Court of Claims (28 U.S.C. 2501) makes each of these persons a potential litigant in the civil courts. If the scope of review asserted by the Court of Claims in these cases is left uncorrected, it is not unlikely that there will be a considerable influx of suits for back pay to test court-martial convictions. At present, there are four more such actions pending in the Court of Claims. Furthermore, a decision by this Court in the instant cases would have a substantial bearing on the 23 cases pending in the other federal courts seeking collateral review of court-martial convictions (only ten of which are on writ of habeas corpus). Continuing growth in the size of our armed forces adds to the prospective significance of the questions here presented.

Moreover, apart from the immediate practical consequences, the questions raised are of considerable doctrinal importance. Congress has set up a well considered and well conducted system of military justice, headed by a civilian Court of Military Appeals. In the ordering of government and the allocation of functions, it is not appropriate or wise that this system should be subject to review on matters of detail by the Court of Claims, which is not a general court of review but is a special tribunal established to provide

a means for suits against the government on contract and tort claims. One of the vital functions of this Court is to determine and preserve the proper allocation of powers among other federal tribunals; that role should be exercised in this case.

CONCLUSION

The petition for writs of certiorari should be granted.

Respectfully submitted.

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